



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Cal-Tex Lumber Company, Inc.

File: B-277705

Date: September 24, 1997

Leon E. Ray for the protester.

Laurie Ristino, Esq., Department of Agriculture, for the agency.

Robert Arsenoff, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that bid was improperly rejected as nonresponsive because bidder failed to include with its bid a certificate of small business status which contained certain performance requirements is sustained where the bid form executed by the protester obligated it to meet the identical performance requirements.

DECISION

Cal-Tex Lumber Company, Inc. protests the rejection of its high bid submitted in response to an advertisement for the "Compartment 32 Backyard Timber Sale" issued by the Forest Service, Department of Agriculture (USDA) for the sale of timber located in the Sabine National Forest in Texas. Cal-Tex maintains that the agency erred in rejecting its bid as nonresponsive because it did not include an executed Certificate of Small Business Status.

We sustain the protest.

The Addendum To Bid For Advertised Timber used for this sale provided as follows:

This is a small business set-aside sale. Bids from others will be considered if no valid bid is received from a small business concern. The CERTIFICATE OF SMALL BUSINESS STATUS at the end of this page must be completed and submitted with the Bid For Advertised Timber in order for small business concerns to receive preferential consideration for sale award.

The Certificate of Small Business Status contained a definition of small business status which included certain performance requirements for the purposes of the sale in question, as follows:

(a) In sales of National Forest timber, a small business is a concern that (1) is primarily engaged in the logging or forest products industry; (2) is independently owned and operated; (3) is not dominant in its field of operation; and (4) together with its affiliates does not employ more than 500 persons.

(b) In sales of National Forest timber with any part to be resold, a small business is a concern that (1) meets the requirements of Item (a) above; and (2) agrees to deliver 100% of the Southern Yellow Pine sawtimber from this sale to small business processing facilities; and (3) agrees that it may deliver other sawtimber species from this sale to large business processing facilities subject to a maximum limitation equal to 30% of the total advertised sawtimber volume for all species listed in the contract.

(c) In sales of National Forest timber not to be resold for manufacture into lumber and timbers, a concern is a small business when (1) it meets the requirements of Item (a) above; and (2) agrees that in manufacturing lumber or timbers from National Forest timber, it will do so only with its own facilities or those of concerns that qualify as a small business.

Four bids were submitted before bid opening at 1 p.m. on July 23, 1997, as follows:

<u>Bidder</u>	<u>Price</u>
Cal-Tex	\$559,276.84
Mims Lumber Company, Inc.	\$550,573.91
Nix Forest Industries, Inc.	\$528,067.98
G.D. Edgar Lumber Company, Inc.	\$525,687.18

Neither Cal-Tex nor Mims submitted an executed Certificate of Small Business Status with its bid (both later submitted executed certificates). By letter dated July 28, the contracting officer rejected the bids of Cal-Tex and Mims as nonresponsive for failure to include the requisite certificates on the theory that the firms were not bound to the performance requirements quoted above. The letter also announced an intention to award a contract to Nix Forest if no protest was filed with this Office within 10 days. This protest was filed on August 6.

In its protest, Cal-Tex, a small business whose size is not in dispute, maintains that it has committed to delivering the timber to itself (thus ensuring that the timber is delivered to a small business). The agency asserts that there is support for the contracting officer's position that the rejected bids are nonresponsive, but also recognizes that the contracting officer's analysis is subject to question because the

identical performance requirements are also included in clause CT6.9 of a sample timber sales contract to which, under the terms of the bid form used for this sale, a bidder explicitly binds itself by signing its bid.

Responsiveness concerns whether a bid constitutes an offer to perform, without exception, the exact thing called for in the invitation. Unless something on the face of the bid, or specifically a part of it, limits, reduces or modifies the bidder's obligation to perform in accordance with the terms of the solicitation, the bid is responsive.¹ The required commitment to the terms of the invitation need not be made in the exact manner specified by the solicitation; all that is necessary is that the bidder, in some fashion, commit itself to the solicitation's material requirements. Challenger Piping, Inc., 65 Comp. Gen. 505, 507 (1986), 86-1 CPD ¶ 385 at 4. In this regard, we have recognized that where signing a bid form binds the bidder to all material terms of a required certification, a requirement for a separate commitment to the same terms in the form of an executed certificate is redundant and of no legal consequence; therefore, failure to execute such a certificate does not constitute a valid basis to reject a bid. A. A. Beiro Constr. Co., Inc., B-192664, Dec. 20, 1978, 78-2 CPD ¶ 425 at 4-5.

Here, as the agency recognizes, the terms of the bid document operate to bind Cal-Tex to the terms of the sample contract by signing its bid, and the sample contract contains the identical performance requirements as those set forth in the Certificate of Small Business Status. Accordingly, the requirement for submitting the certificate with a bid is redundant and of no legal consequence. Id. Thus, the agency should have accepted Cal-Tex's bid; since it did not, we sustain the protest.

We recommend that the agency reinstate the Cal-Tex bid and make award to Cal-Tex if otherwise appropriate. We also recommend that the protester be reimbursed

¹The failure of a bidder under a small business set-aside to provide a properly executed certification of small business status with its bid is normally waivable and the appropriate representation may be made after bid opening because it pertains only to the bidder's status and eligibility for award, not to the firm's commitment to provide the required service. Jimmy's Appliance, 61 Comp. Gen. 444, 445-446 (1982), 82-1 CPD ¶ 542 at 3-4. Thus, the only question here is the effect of the performance requirements included under sections (b) and (c) of the certificate at issue.

its costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1) (1997). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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